The Challenges of EU Enforcement and Elements of Criminal Law Theory: On Sanctions and Value in Contemporary 'Freedom, Security and Justice' Law

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The Challenges of EU Enforcement and Elements of Criminal Law Theory: On Sanctions and Value in Contemporary 'Freedom, Security and Justice' Law

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Abstract: This paper challenges established visions of EU legal enforcement by testing them in the context of criminal law theory and asks to what extent EU law can be enforced against non-compliant Member States via the use of criminal law. A main theme running through this article is the basic question of the extent to which the EU legislator needs criminal law provisions for the enforcement of EU law. The paper does this by looking at the effect of administrative sanctions and their link to criminal law sanctions. In addition, the article assesses the wider theoretical implications for the enforcement of EU law through criminal law and specifically when the values of the EU and those of the Member States are in conflict. Critically, the paper asks if the EU enforcement toolkit is sufficiently nuanced when applied in a criminal law context and sets out to chart the genesis of EU law enforcement through the use of criminal law theory. This seems particularly relevant to the discussion of enforcement in general, given that the operation of EU law essentially and chiefly concerns the values to be enforced in the national arena.

I. Introduction

If any law enforcer were to need a tool, surely it would be criminal law, which is generally considered the ultimate threat of the law. Criminal law is distinctive because of its moral voice; it is a coercive system directed at controlling the behaviour of citizens.[1] But is the EU a moral project, ready to take on

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[1] AP Simester and A von Hirsch, *Crimes, Harms and Wrongs: On the Principles of Criminalization* (Oxford: Hart Publishing, 2011) 3–7.

condemning powers amounting to coercion? The story of EU criminal law and its development has been one of the most controversial in the history of EU legal enforcement. In particular it has cast some light on the thin dividing line between enforcement issues and legislative competence questions proper.[2] Yet while the EU has for a long time had the power to require Member States to provide effective means for ensuring the enforcement of EU law, even if those meant the imposition of criminal law, enforcing EU law through criminalization at the EU level has always been a different question, given that the EU lacked a legislative competence prior to the Lisbon Treaty.[3]

With that background, and given the increased EU sanction powers, a core issue arising in the context of enforcement is the extent to which EU values can be imposed against Member States that no longer comply with the fundamental values of the EU as expressed in the Treaty. As these values play an inherent role in the EU's genetic makeup, it would seem ludicrous if core founding values embraced by the EU and subscribed to by the Member States when signing the Treaty were not upheld in practice.[4] Article 2 of the Treaty of the European Union (TEU) stipulates that the Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law, and respect for human rights, including the rights of persons belonging to minorities. Yet while the EU has high hurdles for candidate states for membership, the stakes seem a lot lower once a state has become a member of the club. The enforcement threat emanating from the EU Commission in the form of infringement proceedings, or from the Court of Justice in the form of a judgment indicating disapproval of an individual Member State's behaviour, is not sufficient to change innate behaviour.[5] Therefore, an important question, albeit largely understudied, is to what extent the EU can use criminal law as a mechanism of enforcement in order successfully to transplant—and maintain—its values in the national arena. The present paper takes this as its starting point and sets out to embark on a broader study as regards the relationship between EU enforcement rules and criminal law theory and how the two could be reconciled in the absence of a clear justification on the part of the EU regarding the use of sanctions.

[2] See S Weatherill, 'Competence and legitimacy' in C Barnard and O Odudu (eds), *The Outer Limits of EU Law* (Oxford: Hart Publishing, 2009) 5.

[3] On the basics of EU criminal law see eg (in English) M Dougan, 'From the velvet glove to the iron fist: Criminal sanctions for the enforcement of Union law', in M Cremona (ed.), *Compliance and Enforcement of EU Law* (Oxford: Oxford University Press, 2012), 74; S Summers *et al.*, *The Emergence of EU Criminal Law* (Oxford: Hart Publishing, 2014); V Mitsilegas, *EU Criminal Law* (Oxford: Hart Publishing, 2009); M Fletcher *et al., EU Criminal Law* (Cheltenham: Edward Elgar, 2008), S Mettinen, *EU Criminal Law* (Abingdon: Routledge, 2013); E Herlin-Karnell, *The Constitutional Dimension of EU Criminal Law* (Oxford: Hart Publishing, 2012); A Klip, *EU Criminal Law* (Munich: Beck, 2009).

[4] See also the recent editorial (2015) 'Safeguarding EU Values in the Member States—is something finally happening?' (2015) 52 *CML Rev* 619.

[5] On the basics of enforcement, see, eg D Chalmers *et al.*, *EU Law* (3rd edn, Cambridge: Cambridge University Press, 2014), ch 5.

More specifically, the paper discusses the wider theoretical implications for the enforcement of EU law through criminal law when the values as expressed in Article 2 TEU and those of the Member States are in conflict or when current EU law norms are not respected and/or maintained in the national arena. And, more critically, is the EU enforcement toolkit sufficiently nuanced when applied in a criminal law context? This paper consequently charts the genesis of EU law enforcement through the use of criminal law by placing it in the framework of the enforcement of values in EU law and thereby debating which kind of values criminal law is capable of communicating. This seems particularly relevant to the discussion of enforcement in general, given that the operation of EU law essentially and chiefly concerns the values to be enforced in the national arena. This article aims to demonstrate that, with regard to the enforcement of EU law through the use of criminal law, the enforcement system presupposes that the legal safeguards in place are sufficiently robust to ensure that the EU itself complies with the Charter standards, as well as the Treaty-based promise of constructing an Area of Freedom, Security and Justice (AFSJ). The paper seeks to demonstrate that the EU's choice of sanctions in its enforcement strategy matters at a number of interrelated levels. First the longstanding reliance on administrative sanctions as part of the market-making package in the EU continues to ask difficult questions as to the application of procedural safeguards that are associated with a criminal law sanction in accordance with the Convention on Human Rights case law.[6] Secondly, while stressing and exemplifying the complicated grid of sanctions in the EU context and the challenges it causes for enforcement, the paper also discusses the peculiarities of enforcement when entering the domain of criminal law theory by briefly outlining the core principles of legality and proportionality. The paper concludes by specifically looking at the enforcement of legal safeguards in EU criminal law. The discussion shows that the question of enforcement has still largely failed to be addressed at the EU level.

II. EU criminal law project and enforcement endeavours: the basic framework for understanding the development of the sanctions regime

While the issue of enforcement in the EU context concerns how EU law is received in the national arena and thereby makes EU law a living concept in the

[6] Eg E Herlin-Karnell, 'Is Administrative Law Still Relevant? How the battle of sanctions has shaped EU criminal law', NYU: Jean Monnet Working Paper 25/14 (2014); J Frese, *Sanctions in EU Competition Law* (Oxford: Hart Publishing, 2014).

Member States,[7] the question of enforcement in a criminal law context is predominantly about placing procedural limits on the way in which state authorities use the criminal law system to implement their policies.[8] These strategies should essentially ensure that the state's enforcement mechanisms are consistent with due process rights.

At present the EU relies on a complex regime combining criminal law and administrative sanctions to enforce its norms and values. This regime has a unilateral goal of enforcing EU law to the greatest extent possible, but without any clear criminal law theory in mind. Yet this seems unwise as much of what criminal law is concerned with is controlling levels of risk-taking, and what kind of behaviour is considered acceptable from a moral and societal perspective.[9]

The purpose and aim of enforcement through the use of criminal law at the EU level have to be placed in context. In the early days of the EU project, the EU legislator relied on administrative sanctions for enforcing EU law.[10] However, the fairly recent *environmental crimes* case of September 2005 opened up a 'Pandora's box' of opportunities for the EU legislator to enact criminal law by stipulating a legislative competence in situations in which this is needed to ensure the full effectiveness of EU law.[11] This ruling shifted a criminal law competence from the Member States to the EU by stating that criminal law could be a matter for the EU legislator if the principle of effectiveness required it. The ruling was considered groundbreaking since there was no legislative criminal law competence in the EU at the time the judgment was delivered, even though the failed Constitutional Treaty would have conferred such a competence in 2005. The judgment was also heavily criticized for placing too much trust in the magic of effectiveness as a criteria for EU criminalization.[12]

With the Lisbon Treaty in 2009, AFSJ matters, including criminal law, were 'supra-nationalized', that is, moved from the former third pillar to that of mainstream EU law. Lisbon listed a set of EU crimes considered to have cross-border dimensions, such as the fight against terrorism and money laundering, in Article 83 TFEU.

Perhaps the most important axiom for the development of EU criminal law enforcement (and sanctions more broadly), however, has been the EU principle of loyalty (Article 4(3) TEU)[13] as it required the Member States to ensure

[7] Eg S Andersen, *The Enforcement of EU Law* (Oxford: Oxford University Press, 2012) and M Cremona (ed.), *Compliance and Enforcement of EU Law* (Oxford: Oxford University Press, 2012).

[8] For an overview, see eg P Whelan, *The Criminalization of European Cartels Enforcement* (Oxford: Oxford University Press, 2014); A Ashworth and M Reymar, *The Criminal Law Process* (4th edn, Oxford: Oxford University Press, 2010), 20–58.

[9] See, for example, V Tadros, 'Controlling risk', in A Ashworth *et al.* (eds), *Prevention and the Limits of the Criminal Law* (Oxford: Oxford University Press 2012) 133.

[10] Case C-68/88 *Commission v Greece* [1989] ECR 1–2965.

[11] Case C-176/03 *Commission v Council* [2005] ECR I-7879.

[12] Herlin-Karnell (n 3).

[13] See eg Case C-68/88 *Commission v Greece* [1989] ECR 1–2965; M Dougan, *National Remedies before the Court of Justice* (Oxford: Hart Publishing, 2004); T Tridimas, *General Principles of EU Law*

compliance with EU law even when that included use of criminal law sanctions. It could thus be said that the principle of loyalty identified a constitutional dynamic, which indirectly ensures what the former EC Treaty lacked before the changes brought by the Lisbon Treaty. While the obligation of loyalty has always played a crucial role in shaping the contours of EU law enforcement, it is interlinked with the principle of effectiveness in EU law which has constrained Member States' autonomy in order not to act against the spirit of the effectiveness of EU law.[14] In this way, it seems like the EU would often appear to be pursuing a goal of effective legislation at the expense of national values.[15] While the debate on EU enforcement is well established, this paper aims to broaden the debate and thereby to explore the issue of enforcement in the context of criminal law theory as such.[16]

A key underlying theoretical issue is the extent to which we need EU criminal law other than in an obvious cross-border scenario, such as the fight against organized crime. This question is actually of great theoretical importance and not merely rhetorical. A criminal lawyer would probably argue that only the state is entitled to administer criminal justice.[17] There are generally, two schools of thought when deciding which acts should be criminalized. An objectivist would argue, for example, that it is the outcome that matters and that the communicative function of law is its ability to signal to society what ought to be punished.[18] A subjectivist, on the other hand, would focus on the moral element of a crime as the guiding dictum for apportioning blameworthiness.[19] Accordingly, expressed in simplified terms, criminal law is chiefly concerned with the question of 'just deserts'; that is, whether the person deserves to be labelled as a criminal and, if so, what level of offence is justifiably applicable. So what justifies action by the EU here? This question has long been evaded in the EU context, largely because there was no political need to address the issue because, prior to the entry into force of the Lisbon Treaty, the EU had no legislative competence to enact criminal law provisions. Instead, the EU created its own quasi-penal system of sanctions, still existing today, which is examined in more detail in the next subsection.

(Oxford: Oxford University Press, 2006); T Konstadinides, *Division of Powers in the European Union* (Deventer: Kluwer Law Publishing, 2009).

[14] See, eg P Craig, *EU Administrative Law* (Oxford: Oxford University Press, 2012) 257.

[15] See eg Case C-399/11 Criminal proceedings against Stefano Melloni. See also A Albi, 'Erosion of Constitutional Rights in EU Law: A Call for "Substantive Co-operative Constitutionalism"', (2015) 9 *Vienna Journal of International Constitutional Law* 151.

[16] See eg Herlin-Karnell (n 3), ch2.

[17] A Ashworth, 'Responsibilities, Rights and Restorative Justice' (2002) 42 *British Journal of Criminology* 578; also discussed in M Thorburn, 'Proportionate Sentencing and the Rule of Law' in L Zedner and J Roberts (eds), *Principles and Values in Criminal Law and Criminal Justice: Essays in Honour of Andrew Ashworth* (Oxford: Oxford University Press, 2012) 269.

[18] A Ashworth, 'Taking the Consequences', in S Shute *et al.* (eds) *Action and Value in Criminal Law* (Oxford: Oxford University Press, 1993) 110.

[19] *Ibid*.

A. Enforcement through non-criminal sanctions in the contemporary EU

In order to better understand the rationale of enforcement of EU law through the use of criminal law, it is necessary to further clarify the delicate debate regarding the characterization of the sanctions used.

The discussion on sanctions in EU law setting has tended to focus on the controversial EU administrative sanctions system and on the question of whether these sanctions, contrary to their 'administrative' label, should properly be viewed as falling under the umbrella of criminal law. Such an interpretation would, in accordance with the criteria laid down by the European Court of Human Rights in the case law on Article 6 of the European Convention on Human Rights (ECHR), ensure the right to a fair trial and a subjective fault element.[20] Administrative sanctions have always formed a crucial part of the EU's enforcement strategy, particularly with regard to competition fines and sanctions in the domain of EU agriculture and fisheries policies.[21] Yet with the entry into force of the Lisbon Treaty, and thereby the legislative competences granted in criminal matters, one would perhaps have thought that there was no further need for administrative law sanctions in the EU where there are already criminal law sanctions in place. The distinction between administrative law and criminal law used to be the main point of departure for the debate on sanctions back in the days when the EU pillars division still determined the realm of competence of the EU's involvement in criminal law proper. In those early days, a lack of legislative competence in criminal law (the former EC pillar) meant that the administrative procedure was the only avenue by which the EU could impose sanctions. However, despite the Treaty reformation and thereby the inclusion of criminal law in the Treaty (as part of the area of freedom, security, and justice), as this paper will show, the EU legislator still favours the administrative procedure in certain market related areas. With the Lisbon Treaty in place, the framework has naturally changed as, alongside the EU's general enforcement armory, Articles 82 and 83 of the Treaty of the Functioning of the European Union (TFEU) specifically grant the EU a competence in criminal law matters with a cross-border dimension.

Yet one of the most clear-cut examples in the contemporary acquis of EU law of where sanctions are still being invoked despite not being considered as belonging to criminal law is where sanctions are being used in the fight against terrorism. The area of restrictive measures (or administrative sanctions) clearly has a significant internal–external dimension to it and haas been subject to debate on the protection of fundamental rights and the scope of the Court's

[20] Eg, *Engel and others v Netherlands* Series A, No 22 [1979–1980].
[21] Eg J Frese, *Sanctions in EU Competition Law* (Oxford: Hart Publishing, 2014).

jurisdiction in the well-known *Kadi* saga.[22] While in *Kadi* the Court of Justice famously extended the jurisdiction of the EU to review, indirectly, UN measures and while that was a ground-breaking development in the context of sanctions, the adoption of the Lisbon Treaty means that the previous jurisdictional shortcomings have been resolved thanks to a specific legal basis in the Treaty. Accordingly, Article 75 TFEU provides for the competence to adopt restrictive measures in the fight against terrorism. A further question then arises about which cases concerning the fight against terrorism are to be considered as falling within the scope of Article 75 TFEU, as opposed to Article 83 TFEU (which includes criminal law in its list), and the criminal law grid, and whether these articles are intended to complement each other. It seems as if the dividing line here is between administrative sanctions (freezing of funds) and criminal law, with the former being part of Article 75 TFEU and the latter forming part of Article 83 TFEU.[23] This confirms a rather broadly defined competence for the adoption of sanctions under Article 75 TFEU.

There is an additional layer of complexity regarding the enforcement of sanctions in this scenario. Specifically, there is difficulty distinguishing between the internal and external effects of EU action in terms of sanctions in the fight against terrorism which is reflected in the recent judgment in *European Parliament v Council*.[24] In this ruling the European Parliament challenged Council Regulation 1286/2009 amending Council Regulation 881/2002 imposing certain specific restrictive measures directed against targeted persons and entities associated with the Al-Qaeda network.[25] The Parliament argued that, having regard to the aim and content of the Regulation, the correct legal basis should have been Article 75 TFEU and not Article 215 TFEU. Article 75 TFEU would guarantee a larger role in the legislative process for the Parliament and would also ensure the jurisdiction of the Court of Justice. It confirms a very scattered role for sanctions, which are located not only within the AFSJ, but also within external relations competences. With regard to the contested regulation, the Court of Justice made it clear that this was based on a Security Council measure and intended to preserve international peace and security, implying that the measure at stake clearly had the characteristics of a Common Foreign and Security Policy (CFSP). In addition, the Court stated that the argument that it is

[22] Court of First Instance (CFI), Case T-315/01, *Yassin Abdullah Kadi v Council of the European Union and Commission of the European Communities* [2005] ECR II-3649; European Court of Justice (CEJ), Case C-402/05 P, *Yassin Abdullah Kadi v Council of the European Union and Commission of the European Communities* [2008] ECR I-5351; General Court, Case T-85/09, *Yassin Abdullah Kadi v European Commission*, judgment of 30 September 2010; Kadi II, Joined Cases C-584/10 P, C-593/10 P, and C-595/10 P, judgment of 18 July 2013 (not yet reported).

[23] See T Gazzini and E Herlin-Karnell, 'Restrictive measures adopted by the EU against individuals from the standpoint of International and European Law' (2011) 36 *European Law Review* 798.

[24] Case C-130/10, *European Parliament v Council*, Opinion of AG Bot delivered on 31 January 2012.

[25] Case C-130/10, *European Parliament v Council*, judgment of 19 July 2012 (not yet reported).

impossible to distinguish between the combating of 'internal' terrorism, on the one hand, and the combating of 'external' terrorism, on the other, did not matter for the choice of legal basis and for the scope of Article 215(2) TFEU as the legal basis of the contested regulation. The Court therefore stressed the political considerations behind the drafting of the Lisbon Treaty and accepted that, when choosing between legal bases, it is not just the role of the European Parliament and the increased democratic input that are the decisive factors.[26] The Court did not specify what those critical factors entailed, but it seems reasonable to conclude that the choice of sanctions, and thereby also the legal basis, mattered at the political level as much as the effectiveness of the actual enforcement or the definition of a sanction. While the *European Parliament v Council* is a case which mainly concerns the dividing line between the internal and the external fight against terrorism, it is also a case which highlights the choice by the legislator to fight terrorism by means of the administrative model and not the criminal law model. Therefore, this case is relevant for understanding the current practice of criminal law sanctions in the EU.

The area of administrative or restrictive measures in the fight against terrorism is not, however, the only area that borders on criminal law and that raises questions as to the exact definition of a sanction. The battles against money laundering and the financing of terrorism, for example, which are listed as crimes in Article 83 TFEU, are still on the agenda in connection with Article 114 TFEU, the internal market provision, as they were before the Lisbon Treaty entered into force. This confirms an interesting hybrid dimension to AFSJ law as relevant not only to external relations law (as in the anti-terrorist laws), but also to hard-core internal market law. This is another area in which the EU's security strategy is widely felt to be the reason why the EU is adopting these measures.

B. EU anti-money laundering action and administrative sanctions

The Money Laundering Directives offer a further interesting example of the imposition of administrative sanctions and thus follows the international trend in the fight against dirty money and the financing of terrorism.[27] It should be remembered that the first EU Directive on anti-money laundering was adopted in 1991.[28] This Directive was subsequently amended in

[26] Case C-300/89 *Commission v Council* [1991] ECR I-2867.

[27] See most recent proposal for a Fourth Money Laundering Directive, COM/2013/045 final, on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing. See generally on money laundering eg N Ryder, *Money Laundering—An Endless Cycle? A comparative analysis of the anti-money laundering policies in the United States of America, the United Kingdom, Australia and Canada* (Abingdon: Routledge, 2012).

[28] Directive 91/308/EEC OJ 1991 L 166/77.

2001[29] and then replaced by a third Directive in 2005,[30] while the Commission has now introduced a fourth Directive.[31] The fourth Directive illustrates an impressive and ambitious attempt by the Commission to address many of the challenges neglected in the previous Directives (for example the definition of a predicate offence).[32] The fourth Directive claims to follow the international trend by including a specific reference to tax crimes within the serious crimes that can be considered as predicate offences to money laundering. This marks a new development compared to the third Directive and is problematic as it involves administrative sanctions in a criminal law context, such as the new offence of tax fraud, in this fourth Directive. The Directive states that it is important to highlight clearly that 'tax crimes' relating to direct and indirect taxes are included in the broad definition of 'criminal activity' in this Directive, in line with the revised FATF Recommendations.[33] While no harmonization of the definitions of tax crimes in Member States' national law is sought, Member States should allow, to the greatest extent possible under their national law, the exchange of information or the provision of assistance between EU Financial Intelligence Units. So while not directly requiring a tax crime competence at the EU level, it does so indirectly by allocating enforcement powers to the EU.[34]

In addition, the fourth Directive imposes an extended duty of risk assessment on the Member States, and raises the awkward question of whether the Member States are actually fit for this task and how the regime should be enforced. One of the arguments put forward in the fourth Money Laundering Directive is the classic claim that the EU is required to act because national action alone is not enough. The fourth Directive states that money laundering and terrorist financing are international problems and that efforts to combat them should be global. Intriguingly, the Directive also covers those illegal activities if they are committed on the internet.[35] But the relationship between the money laundering framework and the cyber crime Directive in this regard is remarkably unclear.[36]

[29] Directive 2001/97/EC of the European Parliament and of the Council amending Directive 91/308/EEC on the prevention of the use of the financial system for the purpose of money laundering OJ L344, 28 December 2004.

[30] Directive 2005/60/EC OJ L309, 25 November 2005.

[31] Fourth Money Laundering Directive, *Directive of the European Parliament and of the Council on the Prevention of the Use of the Financial System for the Purpose of Money Laundering and Terrorist Financing*, Directive (EU) 2015/849.

[32] Money laundering is by definition based on another crime termed a predicate offence, which gives rise to the laundering in question.

[33] Given that different tax offences may be designated in each Member State as constituting 'criminal activity' punishable by means of the sanctions as referred to in point (4)(f) of Article 3 of this Directive, national law definitions of tax crimes may diverge.

[34] Article 57 states 'Differences between national law definitions of tax crimes shall not impede the ability of FIUs to exchange information or provide assistance to another FIU, to the greatest extent possible under their national law.'

[35] On the prevention of the use of the financial system for the purpose of money laundering and terrorist financing, COM (2013) 45/3.

In tandem with the Directive, the EU has also adopted a Regulation, based on Article 114 TFEU, regulating the transfer of funds.[37] This is linked to the EU's internal security strategy and focuses on ensuring a payer's information is made immediately available to law enforcement and prosecutorial authorities. Curiously, while largely overlapping with the Directive, the Regulation points out that it may not always be possible in criminal investigations to identify the relevant data or the person concerned until long after the original transfer took place. Consequently a preventive approach should be adopted and information stored to facilitate investigation. The Regulations affirm that information on the payer and the payee shall not be retained for longer than strictly necessary. Payment service providers of the payer and of the payee shall retain records of the information (Articles 4–7 of the Regulation) for a period of five years.

Yet this raises several questions. Is the retention of data for five years proportionate? Would it stand a proportionality test on the necessity of keeping the data for that long?[38] Indeed, it is difficult to see how the proposal complies with the provisions on data protection.

Finally, the fourth Directive on anti-money laundering adds an extra layer to the complexity of the EU's web of sanctions by requiring an evidence-based approach and by including European agencies such as the European Supervisory Authorities (ESA) in the anti-money laundering scheme. The proposal contains several areas where work by the ESA is envisaged as raising crucial issues with respect to the relationship between this agency and AFSJ agencies such as Europol and Eurojust. This complex interaction of AFSJ policies and financial regulation at the heart of the internal market is intensified by the fact that the European Banking Authority has been asked to carry out an assessment of the money laundering and terrorism financing risks facing the EU. Yet the greater emphasis on the risk-based approach requires an enhanced degree of guidance for Member States and financial institutions on the factors to be taken into account when applying simplified and enhanced customer due diligence and when applying a risk-based approach to supervision. In addition, the ESAs have been tasked with providing regulatory technical standards for certain issues, such as those requiring financial institutions to adapt their internal controls to deal with specific situations.

C. Market manipulation/abuse sanctions

The area of market manipulation (or market abuse) represents another sensitive area in which the boundary of sanctions has become blurred. While it is true

[36] Directive 2013/40/EU on attacks against information systems.
[37] Regulation (EU) 2015/847 on information accompanying transfers of funds.
[38] See eg Case C-293/12 and C-594/12, *Digital rights*, judgment of 8 April 2014 (not yet reported) and Case C-362/14, *Schrems*, judgment delivered on 6 October 2015 (not yet reported).

that the new Market Abuse Directive[39] is based on Article 83(2) TFEU, which provides a more extensive competence than the areas listed in Article 83 (1) TFEU for the effective implementation of a Union policy and so obviously involves criminal law, it also adds administrative sanctions to the picture. According to the Commission, market abuse can be carried out across borders and this divergence undermines the internal market, thus creating scope for perpetrators of market abuse to carry such abuse into jurisdictions that do not provide for criminal sanctions for a particular offence. The Directive[40] is seeking to change this by adding criminal law to the discussion in order to fight market abuse more effectively. For this reason, we now face two instruments: one Directive and one Regulation that, in the ideal world, would complement one another.

The proposed Regulation[41] regulates the same area as the Directive, but its regime is stricter. Interestingly, it could be said that the Regulation brings competition law in through the back door by creating far-reaching surveillance mechanisms and introducing 'blacklisting' of companies, but without ensuring the full protection of criminal law procedure. The Regulation requires the publication of sanctions and allows competent authorities far-reaching powers similar to those of competition law raids and anti-terrorism measures. Therefore, it could be argued that the Regulation brings us very close to the area of competition law, by imposing (as outlined in Arts 1215 of the Regulation) an obligation on issuers of financial instruments to issue so-called listing of companies or individuals engaged in market abuse. This Regulation is closely associated with reform of the MiFID (Markets in Financial Instruments Directive) and it has been suggested that it should become effective on the date that the MiFID review enters into application.[42] Hence the proposal follows the Commission Communication on 'Ensuring efficient, safe and sound derivatives markets: Future policy actions', where the Commission undertook to extend relevant provisions of the MAD to cover derivatives markets in a comprehensive fashion.[43]

As for the legal basis of the Regulation, the Commission states 'There is a need to establish a uniform framework in order to preserve market integrity and to avoid potential regulatory arbitrage as well as to provide more legal certainty and less regulatory complexity for market participants.'[44] Hence, the

[39] Directive 2014/57/EU, Directive on criminal sanctions for insider dealing and market manipulation, OJ L 3/179

[40] *Ibid.*

[41] Regulation (EU) No 600/2014 of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Regulation (EU) No 648/2012.

[42] Directive 2004/39/EC, Markets in Financial Instruments, OJ L 145, 21 April 2004.

[43] European Commission Communication: *Ensuring efficient, safe and sound derivatives markets*, COM (2009) 332, 3 July 2009.

[44] Regulation (EU) No 600/2014 of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Regulation (EU) No 648/2012.

justification for adopting the Regulation is the same as for the proposed Directive, albeit with a different legal basis, namely Article 114 TFEU and the establishment of the internal market. The Regulation aims expressly to contribute to the smooth functioning of the internal market. Most importantly, the Regulation establishes a new layer of sanctions: administrative sanctions regulating the same area as the Directive.[45] Why, then, the need for this dual approach, with both a Directive and a Regulation, to fight market abuse? More generally, the Regulation appears to confirm a new trend where 'less is no longer more' and where the legislator is putting various back-ups into place. The explanation seems to be a lack of efficiency within the EU system and where the financial crisis has prompted the EU to act more vigorously, the effect of the subsidiarity principle is not really considered.

Perhaps the most important lesson to be drawn here is that it can be seriously questioned whether dual regulation through criminal law sanctions and administrative sanctions, as proposed in various EU Regulations and the proposed fourth Directive respectively, breaches the principle of *ne bis in idem* or double jeopardy and, thereby, Article 50 in the Charter of Fundamental Rights. Article 50 states that 'No one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance with the law.' Considering the increasing use of administrative sanctions, it could be argued that such an approach leads to a fundamentally unfair system and that the proportionality principle has an important role to play here so as to avoid double procedures. A recent famous example of tensions between *ne bis in idem* and national administrative sanctions regimes was the case of *Åkerberg Fransson* concerning compatibility with the *ne bis in idem* principle of a national system involving two separate sets of proceedings to penalize the same wrongful conduct and where the Court stipulated a general proportionality requirement.[46] But this would require a structured proportionality test, one which inserts a reasonableness check into the proportionality assessment. With Barak, 'tests of causation and severity regarding the blow to the public interest should be balanced against tests of the limitation of the various human rights at issue'.[47] Surely this must apply to the EU regime on sanctions, that is, where the principle of proportionality could serve as a tool for injecting quality into the legislative regime? Similarly, it questions whether double systems of sanctions are strictly necessary in the area of financial crimes.

Moreover, as mentioned, the market abuse regime for 'blacklisting', through the publication of sanctions and the granting to competent authorities of far-

[45] See E Herlin-Karnell, 'White-collar crime and European financial crises: Getting tough on EU market abuse' (2012) 37 *European Law Review* 487.

[46] C-617/10, *Åkerberg Fransson*, judgment of 26 February 2013 (not yet reported).

[47] A Barak, 'Proportional effect: The Israeli experience', (2007) *University of Toronto Law Journal*, 369.

reaching powers similar to those in competition law raids and anti-terrorism measures, raises some difficult questions. These questions include more general issues relating to the right to a fair trial in EU law and are closely intertwined with the long-standing debate on competition fines.[48]

D. Agencies and administrative sanctions: accountability deficit

The importance of agencies in EU law making in general is far from new. They are often said to represent a step in the direction of 'better regulation'.[49] The exact positioning of these agencies in the legislative context and their place in the AFSJ machinery are, however, unclear. Areas such as medical authorization, electricity regulation, and heath regulation have all been reformed in recent years and offer examples of hybrid governance in terms of combining traditional EU legal instruments with network models relying on agencies and new forms of governance such as comitology and the open method of coordination. This is all new, however, in the AFSJ. While this paper does not delve into this complex debate, the technocratic approaches clearly pose difficulties from a democratic perspective, given that many issues, including medical regulation, touch upon ethical points that require democratic legitimation and accountability.[50] Nevertheless, the prospect of adopting a technocratic model for the AFSJ with regard to criminal law should raise concern. For example, the fourth Money Laundering Directive, discussed above, contains several areas where work by the European Supervisory Authorities is envisaged to raise crucial issues with respect to the relationship between this agency and AFSJ agencies such as Europol and Eurojust. The complex interaction of AFSJ policies and financial regulation at the heart of the internal market is intensified by the fact that the European Banking Authority has been asked to carry out an assessment of the money laundering and terrorism financing risks facing the EU. However, a greater emphasis on a risk-based approach requires an enhanced degree of guidance for Member States and financial institutions on the factors to be taken into account when applying simplified and enhanced customer due diligence and when applying a risk-based approach to supervision. In addition, the ESAs have been tasked with providing regulatory technical standards for certain issues, such as those requiring financial institutions to adapt their internal controls to deal with specific situations. It is technocratic in the sense that the framework for fighting financial crimes is regulated in a way that is similar to that of medical issues and risk regulation in environmental law.

[48] Frese (n 21); Herlin-Karnell (n 45), 487.

[49] See F Vibert, 'Better regulation and the role of agencies' in S Weatherill (ed.), *Better Regulation* (Oxford: Hart Publishing, 2007) ch 20.

[50] J Neyer, *The Justification of Europe: A Political Theory of Supranational Integration* (Oxford: Oxford University Press, 2012) 25–7.

Moreover, while the AFSJ agencies of Europol and Eurojust do not have direct regulatory enforcement powers, they are increasingly important players in the AFSJ regulatory machinery. However, the Member States themselves have retained law enforcement powers and have not delegated such powers to the AFSJ agencies, with the exception of Frontex in the area of migration law policies.[51] Yet Europol has been given extended powers to supervise the EU crime-fighting agenda within the AFSJ, and this has resulted in a complex relationship between AFSJ legislation and the role played by Europol in, for example, the financial tracking programme and the proposals, such as the fourth Money Laundering Directive discussed above, which are part of the internal market *acquis*. The European Securities and Market Authority (ESMA) is responsible for supervising relevant instruments adopted within the internal market. The ESMA Regulation contains a review clause that grants the Court of Justice the power to review fines imposed by this agency. It is not clear, however, to what extent Europol and Eurojust can be called to account for their action.[52] Specifically, it appears difficult for an individual to challenge a decision taken by an Agency and have the question addressed in the EU court, asserting standing or going through the preliminary procedure system may not be straightforward.[53] The same holds true for the possible establishment of a European Public Prosecutor with far-reaching powers to investigate financial crimes and with very little transparency as to how it could be held accountable.[54] There is a clear accountability deficit, therefore, with regard to the role and function of agencies as key agents in the sanction game. It asks fundamental questions about the legitimacy of any enforcement of sanctions through Agencies.

Against the backdrop of the above discussion, the paper will now seek to emphasize what is truly problematic with the EU's enforcement strategy and the lack of a worked out theory as regards the use of sanctions in EU law. After all, the administrative/criminal law distinction may continue to play a role in the future development of EU criminal law. But can an individual challenge the EU's option to invoke an administrative sanction and thereby claim the right to a criminal law sanction or thereby challenge the legal basis for the sanction? Such a claim would not seem overly unrealistic, given that Article 49 the Charter

[51] J Monar, 'Experimentalist governance in justice and home affairs' in J Zeitlin and CF Sabel (eds), *Experimentalist Governance in the European Union* (Oxford: Oxford University Press, 2010) ch 10.

[52] On agencies, eg M Busuioc, D Curtin, and M Groenleer, 'Agency growth between autonomy and accountability: the European Police Office as a "living institution"' (2011) 18 *Journal of European Public Policy* 848–67. See also P Schammo, 'The European Union Securities and Market Authority: Lifting the veil on the allocation of powers' (2011) 49 *CML Rev* 1887.

[53] On judicial review see e.g. A Arnull, 'Judicial review in the European Union' in A Arnull & D Chalmers, *The Oxford Handbook of European Union Law* (OUP, 2015), 376

[54] Proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office, Brussels, 17 Jul. 2013, COM(2013) 534 final 2013/0255 (APP) and G Conway, 'The European Public Prosecutor—holding to account a possible European Public Prosecutor', (2013) *Criminal Law Forum* 1.

sets out a general prohibition against disproportionate criminal law sanctions. The next section sets out what principles of criminal law theory are of crucial importance for the enforcement of EU criminal law and sanctions more broadly. This paper argues that these principles should apply regardless of the characterization of the sanction in question. With that background in mind, and given the complex regulatory layers of sanctions in this area, this paper will shift its focus from EU sanctions to a discussion of what basic theoretical principles of criminal law are crucial when debating enforcement in the EU context. More specifically, why is the enforcement of EU law through the use of criminal law special compared to enforcement through administrative sanctions? After all, the criminal law process often involves a cumbersome procedure, albeit—and most importantly—with a high standard of due process. Hence, the next section discusses the peculiarities of criminal law in more depth by drawing on insights from criminal law theory. In doing so, the paper highlights certain key principles that seem to be forgotten in much of the contemporary evolution of EU criminal law where the EU's tactic in the AFSJ appears to depart from the classic internal market-based formula of removing theof obstacles to market creation.[55] Therefore, the task of this paper is to explain why this is problematic given the reach of EU law into the domain of criminal law.

III. Enforcement issues and elements of criminal law theory

While the question of enforcement concerns the spreading of EU values and the EU synchronization of EU law with national norms, criminal law is rather about levels of risk-taking and what can rightly be defined as 'acceptable' risk-taking from a moral and societal perspective.[56] Hence, the focus on risk-taking means that criminal law predominantly concerns the relationship between the individual and the state.[57] Therefore, criminal law is a regulatory tool for influencing behaviour, while its central element is its communicative function.[58] It could be argued that this 'communicative' element for addressing the accepted level of 'risk-taking', is what distinguishes criminal law from administrative law (which often involves strict liability) as criminal law imposes a 'moral' stigma at the same time as it provides for a broader spectrum of procedural rights.

When discussing enforcement through the use of criminal law in an EU context, it is useful briefly to address the question of why we are enforcing at all. The harm principle has been the natural starting point for any

[55] E Herlin-Karnell, 'Constructing Europe's Area of Freedom, Security, and Justice through the framework of "Regulation": A cascade of market-based challenges in the EU's fight against financial crime' (2015) *German Law Journal* 171.
[56] See Tadros (n 3), 133.
[57] See, eg, Simester von Hirsch (n 1), 4.
[58] *Ibid*. See also A Harel, *Why Law Matters* (Oxford: Oxford University Press, 2014) ch 2.

understanding of the construction of criminal law ever since Mill's famous 'harm to others' stipulation, meaning that the state should intervene as little as possible.[59] According to this principle, the only purpose for which power can rightfully be exercised over another member of a civilized community against his will is in order to prevent harm to others.[60] Feinberg and others developed this concept by arguing that the harm in question should also be wrongful.[61] The assumption in this respect is that criminalization is aimed at protecting interests from harm. However, unlike in a classic state-bound discussion on criminal law, this debate has not driven the EU's presence in criminal law, which means that the question of what harm is being prevented by invoking criminal law has never been specifically on the agenda. Instead, the debate has focused on the merits of using criminal law as a way of accelerating the enforcement carousel in the Member States by focusing on the need for effective, proportionate, and dissuasive sanctions and 'taming' nation states. The harm question was of course indirectly addressed in a classic judgment of an Environmental crimes case, where a lot of weight was loaded onto the full effectiveness of the EU when asserting the EU's competence to enact criminal law for the protection of the environment.[62] While it is beyond the scope of this article to offer a characterization of the harm principle, it is still a question largely connected to the EU's need to work out a theory for EU criminal law. The assumption is that criminalization is aimed at protecting interests from harm. And this is what still needs to be debated at the EU level.

As indicated, the turning point for the EU with regard to the enforcement debate was the Lisbon Treaty, which granted the EU a new competence to legislate on cross-border crimes, as well as an extended competence in criminal matters if this was needed in an area already subject to harmonization. But as shown above, the EU continues to invoke administrative sanctions when beneficial for the effectiveness of the working of the internal market. This raises difficulties in a criminal law context, as the national regimes have to adapt to an EU framework that is not legally mature. What is needed, and largely missing, in the debate on the enforcement of criminal law is an in-depth analysis of which criminal law principles should matter in the EU's endeavours to secure a strategy for enforcing EU law.

In the following subsections I will set out a number of key principles that are intrinsic to fundamental values of criminal law and are also of great importance in EU law. The question of fairness—in broad terms—as guaranteed by the Charter (Article 47) is a value embedded in the EU's aspiration of creating a just

[59] JS Mill, *On Liberty* (London, 1859, reprinted Routledge, 1991).
[60] For an overview, see Simester von Hirsch (n 1) ch 2.
[61] J Feinberg, *Harm to Others* (Oxford: Oxford University Press, 1981). See also the introductory chapter 'The boundaries of the criminal law' in RA Duff *et al.* (eds), *The Boundaries of the Criminal Law* (Oxford: Oxford University Press, 2010), 1.
[62] Case C-176/03 *Commission v Council* [2005] ECR I-07879.

European criminal law space. The broader question of values is also reflected in the question of 'fair labelling', that is, the requirement for criminal law to be invoked fairly and the acknowledgement that it has an important role to play in the conception of what criminal justice means from an enforcement perspective.[63] These values are at present not part of the legal safeguards within the administrative law framework, which is why the administrative law framework is more efficient but lacks the same high standard of rights as criminal law.

A. Legality and fairness

Legality, in terms of the rule of law, is a constitutional principle of the EU as recognized in Article 2 EU and is listed as one of the principles that inspired the EU's creation. In addition, Article 21 EU makes it clear that not only is the EU founded on the rule of law but that that foundational value guides the international action of the Union. Therefore, given the public law nature of the EU criminal law project, the rule of law is of crucial importance to control coercive power and ensure respect for human rights. For EU criminal law to work effectively it has, moreover, to rest on a fair concept of what a common EU criminal law means for Europe. After all, the concept of fairness generally guides the philosophy of criminal law.[64] Fairness is an essential part of the rule of law as it generally requires there to be reasonable and foreseeable rules.[65] While the rule of law sets the outer limits of what is acceptable in a democratic society, the principle of legality is the ABC of any criminal lawyer's grammar. The principle of legality is enshrined in Article 7 ECHR and Article 49 of the Charter, both of which ban retroactive criminal law. Indeed, this principle is the cornerstone of modern criminal law. It is more complex, however, than a simple prohibition of retroactive criminal law; instead, the notion of legality is a conjunction of intertwined principles. Briefly, the principles are that there can be no crime without written law, there can be no retroactive criminal law, there should be maximum certainty[66] and there can be no crime by analogy. In this way the principle of legality, as a general principle of EU and criminal law, helps to control EU institutions and the legislator. There is no doubt that the principle of legality is of great relevance for the individual at the European level as it can provide a basis for avoiding criminal liability in the event of unclear regulations or unimplemented directives. A fifth principle is often added to the above four axioms of legality. This fifth principle, allowing reliance on a more lenient

[63] On labelling, see eg J Chalmers and F Leverick, 'Fair labelling in criminal law' (2008) 71 *MLR* 217 and L Campbell, 'Criminal labels, the European Convention on Human Rights and the presumption of innocence' (2013) 76 *MLR* 681.

[64] J Rawls *Justice as Fairness a Restatement* (Harvard edition, 2001).

[65] Ashworth (n 18), 110.

[66] See, eg, *Kokkinakis v Greece*, ECHR, Series A, No 260-A, 1993; *Cantoni v France*, ECHR, Reports 1996-V; Joined Cases C-74/95 and 129/95, *Criminal proceedings against X* [1996] ECR I-6609 and Case C-354/95 *National Farmers' Union* [1997] ECR I-4559.

provision at the time of sentencing, is commonly found in many European legal traditions and, as noted above, is also affirmed in Article 49 of the Charter.[67] Nevertheless, such use of retroactively lenient legislation goes further than Article 7 ECHR, which 'only' stipulates a ban on retroactive criminal law. Consequently, it could be argued that the principle of a more lenient provision does not constitute a component of the 'core legality rule' and is therefore not an absolute right, but instead an extended version of it. The reason for using it stems from the purpose and function of criminal law; in other words, once legislators change their opinion on what action should be made criminal, there is no point in punishing 'old' wrongdoings. Therefore, Article 49(1) of the Charter expressly mentions the possible use of favourable retroactive law.[68]

Accordingly, an important issue here is in what way, if at all, the principle of legality in criminal law differs from the principle of legality in European law. It is often argued in EU enforcement law doctrine that legal certainty (constituting part of legality) is not meaningful as an abstract principle and that it should instead be attributed on a case-by-case basis.[69] The situation, however, is different in the context of criminal law, where legal certainty is presupposed as far as possible, also at a more abstract level, and where the system in question needs to be compliant with legality in its own right. Hence a case-by-case approach is not sufficient in this area. Creating maximum certainty would require codification of the criminal law provisions with regard to substantive criminal law.[70] This may pose a challenge to the EU motto of united in diversity and moreover is at odds with the adopted concept of mutual recognition, to the extent that it also concerns substantive criminal law, within the AFSJ and instruments such as the European Arrest Warrant that are directly based on trust and diversity.[71]

B. 'Beyond reasonable doubt': the meta-state level legislation

'You have the right to remain silent'—*Miranda*[72]—is perhaps the most well-known sentence any non-lawyer would think of if asked to mention a legal right, and a frequent theme in American TV dramas. It is most definitely also on the EU agenda, and several important instruments have recently been adopted in this area, such as the Directive on the Right of Access to Lawyer.[73]

[67] See also International Covenant of Civil and Political Rights, GA Res 2200A (XXI) of 16 December 1966, Art 15.
[68] See also Art. 15(1) Covenant of Civil and Political Rights and Art. 24 of the Rome (ICC) Statute.
[69] S Prechal, *Directives in EC Law* (Oxford: Oxford University Press, 2005), 203.
[70] These days, this is true also with regard to (most) criminal law in common law jurisdictions See, for example, A Ashworth and J Horder, *Principles of Criminal Law* (Oxford: Oxford University Press, 2013), 7.
[71] /584/JHA [2002] OJ L190/1, on the EAW framework decision.
[72] US Supreme Court, *Miranda v Arizona* (1966), nr 759 June 13, 1966.
[73] Directive 2013/48/EU, see also COM (2014) 144 final, 'The EU Justice Agenda for 2020—strengthening trust, mobility and growth within the Union'.

As pointed out by Walen and Kumm, though, if the standard of achieving 'beyond reasonable doubt' as the basis for the presumption of innocence were to tip totally in the direction of protecting individuals from being wrongly punished, there could be no institutionalized practice of punishment in a non-utopian world.[74] The presumption of innocence is still a holy principle in criminal law theory, albeit not one that is immune from politics and failures in the criminal process. Nevertheless, this presumption is the baseline of due process guarantees and, as such, a core expression of the rule of law.[75] After all, Article 6(2)–(3) ECHR states *inter alia* that 'Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law' and shall have the right 'to examine or have examined any witnesses against him'. There is no explicit general right to 'expect' a strictly laid down evidence procedure: what matters is that the evidence in question should be collected and considered objectively.[76] In other words, the crucial matter is that the defendant must be treated fairly and have the right to a defence and that the burden of proof rests—with certain limited exceptions—on the prosecutor.

The EU is currently very active in the field of procedural protection and fair trial, which is a welcome development and a result of the extended competences granted by the Lisbon Treaty. The first step in this process is Directive 2010/64 EU on the right to interpretation and translation,[77] with a second, more recent legislative initiative including the proposal for a Directive[78] on the right to information in criminal proceedings. The third step is the Directive on the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest.[79] Arguably, the Directive on access to a lawyer is the most far-reaching so far of any EU criminal law legislation in procedural criminal law.[80] In line with the mandate set out in the roadmap for the strengthening of procedural rights, this Directive lays down minimum requirements at the EU level governing the rights of suspected and accused persons and their right to have access to a lawyer. It thus promotes the application of the Charter, and in particular Articles 6, 47, and 48 of this Charter, by building on Article 6 ECHR and the notion of a fair trial. Interestingly, the Directive states that 'Any derogation must be justified by compelling reasons pertaining to the urgent need to avert danger for the life or physical integrity of one or more people, in addition,

[74] M Kumm and A Walen, 'Human dignity and proportionality: Deontic pluralism and balancing', in G. Huscroft *et al.* (eds), *Proportionality and the Rule of Law* (Cambridge: Cambridge University Press, 2014), 67.

[75] See E van Sliedregt, *Ten to One. A Contemporary Reflection on the Presumption of Innocence* (The Hague: Boom Juridische Uitgevers, 2009).

[76] It is also important that any uncertainties are interpreted in favour of the defendant.

[77] Directive 2010/64EU, OJ L 280 of 26 October 2010.

[78] *Ibid.*

[79] Directive on the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest COM (2011) 326, adopted by JHA Council 2013.

[80] See the discussion in House of Lords, 30th Report, The European Union's policy on criminal procedure. 30th report of session 2010–12.

any derogation must comply with the principle of proportionality, which implies that the competent authority must always choose the alternative that least restricts the right of access to a lawyer and must limit the duration of the restriction as much as possible. Furthermore, the proposed Directive states that 'In accordance with ECHR case law, no derogation may be based exclusively on the type or seriousness of the offence and any decision to derogate requires a case-by-case assessment by the competent authority.'

The instruments are based on Article 82 (2) in order to facilitate mutual recognition in criminal matters and facilitate a fair trial culture across Europe.

Furthermore, the Directive states that in accordance with ECHR case law, no derogation may be based exclusively on the type or seriousness of the offence and any decision to derogate requires a case-by-case assessment by the competent authority. It should be mentioned that the Charter of Fundamental Rights also grants exceptions to the rule of absolute fundamental rights protection (Article 52), contingent on the proportionality principle.

C. Proportionality as a value and the question of EU criminal law enforcement

The principle of proportionality is of course sacred in the EU context.[81] In criminal law it is generally regarded as a principle for deciding on the level of the punishment.[82] In this sense, the sentencing judge has an obligation to provide proper justification for the sentence imposed in a particular case.[83] As Thorburn puts it, 'Her [the judge's] first obligation is to determine what justice requires by way of a proportionate sentence, for it is a matter of 'common-sense notions of justice, that how severely a person is punished should depend on the degree of blameworthiness of his conduct'.[84] As observed by Ashworth, though, while the ECHR poses few constraints in this regard, other than the general message of Article 7 ECHR and the ban on retroactive criminal law, Article 49 of the Charter makes it clear that the severity of a penalty must not be disproportionate to the criminal offence. Here, proportionality means that the punishment for an offence should be proportionate to the seriousness of the offence, taking into account the harm, wrongdoing, and culpability involved. In addition, there is a link between proportionality and the issue of a fair trial by insisting that the appropriate legal safeguards must be respected.[85] In other words,

[81] Craig (n 14), 590.

[82] A von Hirsch and A Ashworth, *Proportionate Sentencing: Exploring the Principles* (Oxford: Oxford University Press, 2005), 131.

[83] For a recent interesting study, N Lacy and H Pickard, 'The chimera of proportionality: Institutionalising limits on punishment in contemporary social and political systems' (2015) 78 *MLR* 216–40.

[84] Thorburn (n 17), 26.

[85] A Ashworth, 'Criminal law, human rights and preventive justice' in A Norrie *et al.* (eds), *Regulating Deviance* (Oxford: Hart Publishing, 2009), 87.

proportionality can restrict the enforcement of sanctions if the latter are considered disproportionate.

Proportionality in criminal law could be a question, however, of self-defence; in other words, the question of whether an act carried out in order to avoid a crime being committed was proportionate to the harm caused.[86] Moreover, the principle of proportionality is generally seen as different from the traditional administrative principle within EU law. The reason for this is that the administrative principle can take future-oriented aspects and their broader impact on EU law into account, while the principle of proportionality is restricted to the facts at hand. Consequently, the administrative principle is *prospective* and thus different from the criminal law principle of proportionality. The latter is *retrospective* and so requires the penalty to be proportionate to the seriousness of the specific infringement. These issues obviously demonstrate the very complex nature of supranational involvement in criminal law, where the same principles can have different meanings. In other words, proportionality constitutes an important value in EU criminal law by insisting on a commonsense element in the law. At a more theoretical level, the very notion of proportionality—the question of balance—is about ensuring fairness.[87]

The link between fairness and proportionality in an EU constitutional context was demonstrated by the recent case of *Digital Rights*,[88] where the Court of Justice annulled the 2006 Data Retention Directive that was aimed at fighting crime and terrorism and allowed data to be stored for up to two years. It concluded that the measure breached proportionality on the grounds that the Directive had a too sweeping generality and therefore violated, *inter alia*, the basic right of data protection set out in Article 8 of the Charter. The Court pointed out that the competent national authorities' access to data retained was not made dependent on a prior review carried out by a court or by an independent administrative body whose decision sought to limit access to data to what was strictly necessary for the purpose of attaining the objective pursued. Nor did it impose a specific obligation on Member States to establish such limits. The EU legislator had therefore failed to provide sufficient justification. The finding has a broader constitutional significance for the EU criminal law project. If the Court is to develop criteria for the increasing use of proportionality as a balancing principle in connection with the Charter, this will arguably confirm a tentative version of a contextual criminal justice approach.

In addition, obviously, any enforcement of EU law needs to respect and safeguard the equality paradigm. As the Court of Justice has frequently pointed out, the principle of non-discrimination requires that comparable situations must not be treated differently and that different situations must not be treated in the same

[86] See, eg, A von Hirsch and N Jareborg, 'Gauging criminal harm: A living-standard analysis' (1991) 11 *OJLS* 1.

[87] See R Dworkin, *Law's Empire* (Oxford: Hart Publishing, 1999).

[88] Case C-293/12, opinion of AG Cruz Villon delivered on 12 December 2013, judgment of 8 April 2014.

way unless such treatment is objectively justified.[89] Hence, the notion of non-discrimination is obviously of utmost importance in criminal law in that it forms part of the broad concept of a fair trial. This brings us to the question of the enforcement of procedural safeguards as part of the EU's striving for equality.

IV. Reconciliation of the sanctions regime with due process guarantees and mutual recognition

The discussion as set out above has served the purpose of outlining the debate on sanctions at the meta-state level as well as highlighting the importance of discussing the implications of fundamental principles of criminal law within this debate. The purpose of doing so was to highlight the complex web of the enforcement regime for sanctions and how the distinction between administrative and criminal is blurred when entering the domain of criminal law theory. Such a discussion seems particularly pertinent given that the EU has been accused of neglecting procedural safeguards as part of the general securitization of EU enforcement of criminal law following 9/11, and the hasty enactment of instruments such as the European Arrest Warrant (EAW).[90]

An important component for achieving a structured enforcement of values is, of course, to have a sufficiently high standard of human rights across the EU. The latest step in the direction of establishing a European framework of EU criminal law for protecting the victim is the Directive on the protection of the victim.[91] This aims to ensure that the wide-ranging needs of victims of crime, which cut across various other EU policies, are respected and met. The protection of victims' rights is an essential element in a range of EU policies and instruments related to human trafficking, sexual abuse, and sexual exploitation of children, violence against women, terrorism, organized crime, and the enforcement of road traffic offences. The current weak status of the victim in EU law is perhaps confirmed by the cases of *Gueye and Sanchez* and *Criminal proceedings against X* concerning the interpretation of Framework Decision 2001/220/JHA on the protection of the victim.[92] In these cases the Court of Justice stated that not only did this Framework Decision leave a large margin of appreciation to the Member States in their implementation, but also that the

[89] See, for example, Case C-303/05 *Advocaten voor de Wereld* ECR [2007] I-3633.

[90] The European Arrest Warrant Framework Decision [2002] OJ L 190/1, see eg M Fichera, *The Implementation of the European Arrest Warrant in the European Union Law, Policy and Practice* (Antwerp: Intersentia, 2011). J Ouwerkerk, *Quid Pro Quo? A Comparative Law Perspective on the Mutual Recognition of Judicial Decisions in Criminal Matters* (Intersentia 2011).

[91] Directive on establishing minimum standards on the rights, support and protection of victims of crime, Directive 2012/29/EU.

[92] Case C-483/09 and C-1/10 *Gueye and Sanchez*, judgment of 15 September 2011 (not yet reported) and Case C-507/10 *Criminal proceedings against X*, judgment of 21 December 2011 (not yet reported).

Framework Decision did not impose any obligation on Member States to ensure that victims were treated in a manner equivalent to that of a party to proceedings. Thus, the new Directive on the protection of the victim represents an important symbolic gesture by the EU on the criminal justice stage and will possibly enhance the successful enforcement of EU law. However, the EU is currently also very active in the field of procedural protection in the legislative domain.

As explained above, the enforcement of EU law through the template of mutual recognition is based on trust.[93] For this reason, the rather abstract debate on sanctions and criminal law principles also needs to fit the empirical reality of possible distrust in the Member States and conversely how the idea of trust could be created.

This has long been the main theme in AFSJ law, particularly with regard to EU cooperation in criminal law. Does mutual recognition, then, offer a pluralistic approach to enforcements issues in criminal law? The answer to this question would seem to be 'No', given the recent case of *Da Silva Jorge*, in which the Court of Justice extended the reach of the classic effectiveness test to the EAW.[94] In this case the Court emphasized the importance of the full effectiveness of the operation of the EAW, also with regard to the possibility of opting out of this measure in certain circumstances. For example, Article 3 EAW provides a list for mandatory grounds for refusing to execute an EAW, such as where there are granted amnesties, where there is a *ne bis in idem* (double jeopardy) situation, or where, for example, the person in question is deemed too old to stand trial. Article 4 EAW on the other hand lists a number of so-called optional grounds for refusing to surrender and thereby reinstates the dual criminality concern by giving some discretion to national authorities in this regard. Moreover, there are possibilities for refusing to surrender a person where the crime in question is statute barred or does not constitute a crime in the executing state or if the EAW has been issued for the purposes of the execution of a custodial sentence or a detention order and the person in question is resident in the executing state and that state undertakes to execute the sentence or detention order in accordance with its domestic law.

Yet in the *Da Silva Jorge* case, the Court held that despite the arrangements laid down in the EAW, 'the fact remains that the principle that national law must be interpreted in conformity with European Union law, it also requires national courts to do whatever lies within their jurisdiction, taking the whole body of domestic law into consideration and applying the interpretative methods recognized by it, with a view to ensuring that the framework decision in

[93] On mutual trust in the AFSJ see, K Lenearts, 'The Principle of Mutual Recognition in the Area of Freedom, Security and Justice', talk delivered at the Fourth Annual Sir Jeremy Lever lecture, All Souls College, University of Oxford, 30 January 2015 (on file with the author).

[94] Case C-42/11, *Joao Pedro Lopes Da Silva Jorge*, judgment of 5 September 2012 (not yet reported).

question is fully effective and to achieving an outcome consistent with the objective pursued by it'. So effectiveness often appears to trump diversity in criminal law matters if the idea of 'trust' is to be maintained.

Yet the well-known *Advocaten voor de Wereld* offers a good example of the 'trust' in trust as the solution for enforcement of criminal law in the Union.[95] In this case, the Court of Justice insisted that the EU judicial area for criminal law cooperation had sufficient mutual trust in order to justify the application of mutual recognition in this area. A lot of water has passed under the bridge since then, however. In a recent communication on the strengthening of trust in the Union, the EU Commission stated that people are increasingly crossing borders and becoming increasingly frustrated by the cumbersome procedures.[96] Interestingly, the Commission linked the issue of trust in criminal law to the economic crisis and stated that cross-border movements had affected the efficiency and capacity of some national justice systems and that this was undermining trust, while more trust was in fact needed. Moreover, the Court of Justice held in *Melloni* that in a system such as that of EU criminal law cooperation, which is based on mutual recognition, the very notion of trust means that the individual EU Member States cannot use the Charter as a way of derogating from the protection of EU fundamental rights.[97] The *Melloni* case concerned the validity of amendments made to the EAW by Framework Decision 2009/299/JHA[98] and addressed the application of the principle of mutual recognition to trial *in absentia.* The Court of Justice held that a reading of the Charter as an opt-out from trust would undermine the principle of the primacy of EU law. Specifically, the Court stated that where an EU legal act calls for national implementing measures, national authorities and courts remain free to apply national standards of protection of fundamental rights, provided that these national standards do not compromise either the level of protection provided by the Charter, as interpreted by the Court, or the primacy, unity, and effectiveness of EU law.[99] It could be argued, however, that there is nothing to hinder the EU from adopting a higher standard of protection than the Member States.

The message of *Melloni* then, according to the recent Opinion 2/13 on the accession to the ECHR, is protecting EU law's supremacy from divergent (stricter) application of fundamental rights.[100] In Opinion 2/13, the Court held that the principle of mutual trust requires, particularly with regard to

[95] Case C-303/05 *Advocaten voor de Wereld* [2007] ECR I-3633, case comment N de Boer CML REv (2013).
[96] COM (2014) 144 final, 'The EU Justice Agenda for 2020—strengthening trust, mobility and growth within the Union'.
[97] Case C-399/11, Criminal proceedings against *Stefano Melloni*, judgment of 26 February 2013 (not yet reported).
[98] Framework Decision, 2009/299/JHA, 2009 OJ L81/24.
[99] Case C-399/11, Criminal proceedings against *Stefano Melloni*, judgment of 26 February 2013 (not yet reported), §60.
[100] Opinion 2/13 of 18 December 2014, EU accession to the ECHR.

the AFSJ, 'each of those States, save in exceptional circumstances, to consider all the other Member States to be complying with EU law and particularly with the fundamental rights recognized by EU law'. Hence the EU's accession to the ECHR was seen as potentially weakening the EU enforcement project. This unilateral approach may appear a contradictory message against the background of the struggle to achieve better enforcement in criminal law.

Yet the creation of trust is a long-term challenge of fundamental importance for the EU. Its communication entitled 'The EU Justice Agenda for 2020—Strengthening Trust, Mobility and Growth within the Union' suggests, therefore, that there is reason for hope.[101] The approach selected by the Commission and summed up by three key words—consolidate, codify, and complement—signifies that the Commission will focus on the need to uphold fundamental rights by ensuring effective remedies and improving judicial training. With regard to 'consolidation', the Commission has specifically emphasized the need for digitization as this will facilitate access to justice. By 'codification', the Commission means that the need to incorporate all legislation previously enacted with regard to due process rights into a single instrument will make it more accessible. Finally, and of utmost importance, by 'complement' the Commission means that the EU should develop a common sense of justice linked to the broader question of values. This would seem particularly important for the successful enforcement of EU values in criminal law.

If this paper has succeeded in its mission of outlining the complex sanction regime in EU law and its complicated elements of criminal law, it begs fundamental questions as to the future of the AFSJ and how to reconcile high human rights protection with EU enforcement concerns and more fundamentally what it tells us about a criminal theory for Europe.

V. Concluding remarks

This paper had three specific aims. First, it started form the empirical position that the enforcement of EU law against Member States is a question of the willingness of the Member States to endorse the EU's values. Yet, the question of enforcing EU law against recalcitrant Member States appears slightly different in the context of criminal law compared to that of more mainstream, or at least more established, areas of EU law. Thus, the paper set out to explore the question of enforcement through the sanctions regime, by illuminating how 'messy' the EU sanctions system is with regard to the division between administrative (or regulatory) and criminal law sanctions. The paper did so by scanning recent EU measures against financial criminality. The second part critiqued this

[101] COM (2014) 144 final, 'The EU Justice Agenda for 2020—strengthening trust, mobility and growth within the Union'.

through a normative framework by discussing the fundamentals of legality and due process and highlighting the legal theoretical questions that are all too often neglected in the EU criminal law debate. Subsequently, the third part looked at enforcement issues through the lens of mutual recognition and procedural safeguards in EU criminal cases. The paper demonstrated that the enforcement web for EU sanctions consists of a complicated and interrelated regime of administrative sanctions and criminal law sanctions interacting with the more general theme of mutual recognition in EU criminal law and contingent on the effectiveness requirement of EU law.

Why then is such a study important? It is very important for several reasons. Criminal law is different from other fields of law; insisting on the enforcement of EU law may therefore have drastic consequences if less than the whole package of procedural values in criminal law is applied. Criminal law is specifically different because any enforcement of it would presuppose that the system offered by the EU is of a higher quality, in terms of providing greater protection of the individual, than the one offered by the nation state. So far, the EU criminal law venture has developed on the basis of strong enforcement concerns and a desire to curtail Member States' sovereignty. It has also developed on the premises of a rather fixed debate on the sanctions of EU law, with the administrative/constitutional divide being largely static and not subject to any clear criteria, except for general effectiveness concerns. This has been problematic from the perspective of creating a culture of 'fair' enforcement in an EU criminal law project containing both the sword (enforcement of norms) and the shield (protection of the individual).

Perhaps the conclusion of this paper is regrettable from the perspective of national sovereignty, as it would arguably pre-suppose a full harmonization programme (to ensure the rights set out in the Charter of Fundamental Rights) of procedural criminal law at the EU level.

In any case EU criminal law offers a excellent, albeit difficult, test case of how to promote trust in the Union project, and thereby facilitate the operation of mutual recognition, as a way of fostering a good culture in AFSJ law through enforcement. Yet recent case law on mutual recognition and the operation of the EAW seems to be focused more on maintaining the effectiveness of the EU enforcement machinery. This may render the enforcement of EU law against unwilling Member States a tough job—at least in the current shaky political climate—and the EU will have to make sure that the incentives offered are worth the possible losses in individual states.

As the present author has suggested elsewhere, despite the broader mandate given by the Lisbon Treaty, it would be wise for the EU legislator (in the current state of play) to limit itself to 'cross-border' criminality and the field of financial crimes that in one way or another could be linked to the concept of market creation.[102] The reason for this is that the EU has already been relying on quasi-

[102] Herlin-Karnell (n 3) ch 8.

penal law in terms of administrative sanctions in this area for a long time, so the difference would not be very great. The danger is when the legislator adopts a double system of sanctions and the proportionality principle must be considered when deciding on the need for double regimes of sanctions. Therefore Article 49 of the Charter, stipulating the 'right' to a proportionate sanction should apply to all sanctions and could work as a rebutter of double punishment.[103]

Last but not least, we should not forget that the use of enforcement through criminal law at the meta-state level involves the use of coercive power against the individual; this ultimately begs the question of what it means to create a good European culture of EU criminal law in the current times of enforcement concerns and what kind of sanctions regime the EU is striving to establish.

[103] A Barak, *Proportionality, Constitutional Rights and Their Limitations* (Cambridge: Cambridge University Press, 2012). See also Case C-617/10, *Åkerberg Fransson* judgment of 26 February 2013 (not yet reported).